Statutes

Other Authorities

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISCOVERY COMMUNICATIONS, INC., and THE LEARNING CHANNEL, INC., Plaintiffs, v. UNITED STATES OF AMERICA, and FEDERAL COMMUNICATIONS COMMISSION, Defendants.	Civil Action No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Introduction

The Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") threatens the growth and viability of cable television, and its enhancement of public information and discourse. The Discovery Channel and The Learning Channel are premier examples of worthy and diverse programming made possible by the advent of cable, and the removal, in the last decade, of governmental restraints on cable's growth. The Discovery Channel features documentaries about science, nature, technology, human events and history. See Declaration of John Hendricks ¶ 10-12, ("Hendricks Decl."). The Learning Channel

features educational programs for viewers of all ages, including six hours of commercial-free educational programming every weekday for preschool children, mathematics programs for elementary school children, writing programs for high school students, and remedial reading programs for adults. Declaration of William Goodwyn ¶ 4 ("Goodwyn Decl.").

While invoking First Amendment values, the Cable Act subverts the freedom, diversity, and competition of ideas that the First Amendment protects. With only limited exceptions, the Cable Act requires that cable operators must carry local commercial broadcast signals and other signals, that broadcasters may demand a certain channel position regardless of the operator's judgment or the existence of another program on the chosen channel, that cable operators cannot charge broadcasters for carriage of their signals but that broadcasters may charge cable operators for such carriage, that operators must carry broadcast and other signals on their basic service tier, that municipal political authorities will establish the rate that operators may charge for the basic tier, that all rates will be subject to local or federal reduction if "unreasonable," and that vertically integrated cable programmers must give their programming to all comers at equal prices, terms, and conditions of sale.

The provisions of this extensive regulatory scheme -- separately and collectively -- violate the First Amendment rights of The Discovery Channel and The Learning Channel, causing them

irreparable injury. Rate regulation, requiring cable operators to carry over-the-air broadcasters at the basic service level at a single basic rate, will drive The Discovery Channel and The Learning Channel to higher programming tiers with small audiences or, in some cases, off the system altogether. The regulations imposed on programmers who are affiliated with cable system operators restrict the freedom of contract of The Discovery Channel and The Learning Channel, but permit rate discrimination and exclusive contracts by competing programmers such as ESPN, CNBC and A&E who are affiliated with broadcast networks. The must-carry and leased-access provisions mandate carriage of numerous over-the-air broadcast signals and limit the remaining channels for which The Discovery Channel and The Learning Channel must compete. Mandating channel positions for over-the-air broadcasts also favors these speakers over cable programmers.

There is no precedent in First Amendment jurisprudence for speech regulation of the magnitude of the Cable Act. No reported case addresses an analogous regulatory regimen. Government regulations could not similarly intrude upon the operations of newspapers, magazines, pamphlets, motion pictures, or video cassettes. Congress invokes "substantial First Amendment interests" to justify the Cable Act. But the First Amendment operates to restrain government, not to empower it to impose its

own regimen of First Amendment "interests" on a private First Amendment speaker.[1/]

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because (1) they are substantially likely to succeed on the merits; (2) they will be irreparably injured in the absence of the requested relief; (3) no other parties will be harmed if temporary relief is granted; and (4) the public interest favors entry of a preliminary injunction. National Treasury Employees Union v. United States, 927 F.2d 1253, 1254 (D.C. Cir. 1991) (quoting Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C. Cir. 1989)).

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CONSTITUTIONAL CHALLENGE TO THE CABLE ACT.

A. The Constitutional Standard Applicable to Reviewing the 1992 Cable Act.

The cable medium, which includes both system operators and programmers, engages in protected First Amendment speech. As the Supreme Court recently observed, "[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operations, part of the 'press'". Leathers v. Medlock, 111 S.Ct. 1438, 1442 (1991); see also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

1/ The background of cable, the history of The Discovery Channel and The Learning Channel and the impact of the Cable Act on The Discovery Channel and The Learning Channel are fully set forth in the Affidavits of John Hendricks, Chairman of Discovery Communications, Inc. and William Goodwyn, its Vice President, submitted herewith.

Each medium "tends to present its own peculiar problems. But the basic principles of the freedom of speech and the press, like the First Amendment's commands, do not vary. Those principles, as they have frequently been enunciated by [the Supreme] Court, make freedom of expression the rule." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

The unqualified right of the media to be free from governmental regulation of its speech was forcefully elaborated in the seminal case of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Court held that the First Amendment condemned a Florida law that compelled newspapers to publish replies from political candidates who had been attacked in the newspaper.

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitation on the size and content of the paper, and treatment of public issues and public officials--whether fair or unfair--constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258 (footnote omitted).

Tornillo's rigorous protection of speech has been widely applied outside the context of newspapers. See, e.g., Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 11 (1986) (based on "[t]he concerns that caused us to invalidate the compelled access rule in Tornillo," public utility could not be compelled to carry citizen newsletter in its billing envelopes); Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781, 797 (1988) (because Tornillo "did not rely on the fact that Florida restrained the press, and has been applied to cases involving expression generally," state could not compel certain public disclosures from charitable fundraisers); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing Tornillo for proposition that First Amendment freedom "includes both the right to speak freely and the right to refrain from speaking at all," and striking down New Hampshire statute requiring non-commercial vehicles to bear license plates with state motto, "Live Free or Die").

With such broad Supreme Court application of Tornillo, it is not surprising that the D.C. Circuit has concluded that the Tornillo standard presumptively applies to cable. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir.) (noting "nothing in the record before us to suggest a constitutional distinction between cable television and newspapers" that would justify treating cable differently from newspapers), cert. denied, 434 U.S. 829 (1977).[2/] That the cable medium involves protected editorial judgment, and hence presumptive application of Tornillo protections, is now well-established.[3/]

Government restriction of First Amendment rights "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980); see also NAACP v. Button, 371 U.S. 415, 438 (1963) ("only a compelling state interest . . . can justify limiting First Amendment freedoms," and even then, "[p]recision of regulation must be the touchstone"). No such justification exists here.

2/ See also Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1450 (D.C. Cir. 1985), cert. denied sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978) ("we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access"), aff'd, 440 U.S. 689, 707-08 & n.19 (1979) (declining to reach First Amendment issue "save to acknowledge that it is not frivolous"); Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633, 636 (M.D. Ga. 1991) (concluding that the "analogy of cable television to the traditional media of newspapers is close enough to afford cable the same first amendment protection as print media"); Century Federal, Inc. v. City of Palo Alto, 648 F. Supp. 1465, 1470 (N.D. Cal. 1986) (concluding that Tornillo protections apply to cable because "[a]pplication of a lesser standard of protection . . . is an exception to the rule that must be justified by a particular difference").

3/ See Quincy Cable TV, 768 F.2d at 1452 & n.39 (especially given rise of cable programming industry, cable's exercise of editorial discretion is equivalent to newspapers, notwithstanding early regulation of cable which was based on anachronistic view of cable as neutral conduit for broadcast signals). Cable's editorial discretion extends to "determinations regarding the total service offering to be extended to subscribers." FCC v. Midwest Video Corp., 440 U.S. 689, 707-08 n.17 (1979).

1. None of the Congressional Concerns Motivating the Broad Regulations in the Cable Act Justifies the Act's Abridgement of Fundamental First Amendment Rights.

Congress purports to justify the regulatory regimen imposed on the cable medium by asserting government interests in protecting consumers from market rates, protecting broadcasters from market competition, checking the "market power" of cable, and enhancing the diversity of an inherently diverse medium. Cable Act § 2. These interests warrant no deference from this Court. Congressional findings cannot override First Amendment rights.

> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); see also Sable Communications of Cal., Inc. v. FCC, 109 S.Ct. 2829, 2838 (1989) (rejecting argument that court should defer to congressional judgment about constitutional issue because it is court's task to decide whether Congress violated Constitution, which is "particularly true where the legislature has concluded that its product does not violate the First Amendment").

a. Congressional Economic and Consumer Protection Concerns Cannot Justify Targeting the Cable Medium With Special Burdensome Regulations.

Congress justified its imposition of rate regulation with the assertion that cable rates are too high, notwithstanding the

fact that millions of Americans continue to voluntarily spend discretionary income to subscribe to cable television. Cable Act §2(a)(1). Cable television is hardly a necessity that demands regulation under a public utility rationale. Cable television is entertainment and deserves regulation no more than the price of tickets to the Metropolitan Opera. See Cable Act § 2(a)(1).

In any event, economic regulations, including rate regulations, that either single out the media, or target certain members within the media, offend the First Amendment. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-93 (1983).

In Minneapolis Star, the Supreme Court struck down a Minnesota state "special use" tax on the cost of paper and ink consumed in the production of publications, using a rationale equally applicable to rate regulations.4/ The tax exempted the first $100,000 worth of paper and ink consumed annually. The Court found the tax offensive under the First Amendment for two reasons. First, it singled out the press with differential taxation, which the Court later characterized as "presumptively unconstitutional." Leathers, 111 S.Ct. at 1443 (citing Minneapolis Star, 460 U.S. at 585). Second, the tax "targeted a small group of newspapers -- those so large that they remained subject to the tax despite its exemption for the first $100,000

4/ See Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 734 (2d Cir. 1985) ("We do not think that the rationale of Minneapolis Star is limited to taxation.").

of ink and paper consumed annually." Leathers, 111 S.Ct. at 1443; see also Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (striking down state tax that exempted religious, professional, trade, and sports magazines, and reaffirming unconstitutionality of targeting certain members of the media).

In Riley, 487 U.S. at 787-95, the Court invalidated a North Carolina statute regulating fees that fundraisers for charitable groups could charge. The Court held that the state's economic regulation of protected speech offended the First Amendment even though the state was attempting to redress a finding of widespread fraud in the charitable fundraising industry. And in Meyer v. Grant, 486 U.S. 414, 428 (1988), the Court invalidated a Colorado law that prohibited paying people to collect signatures for an "initiative petition" to put initiatives on the ballot. The law was offensive, the Court ruled, because among other reasons "it limits the number of voices who will convey [the] message and the hours they can speak and, therefore, limits the size of the audience they can reach." Id. at 422-23.

b. Congressional Concern to Enhance the Interests of Broadcasters, No Matter How Well-Intended, Unconstitutionally Favors One Class of Speakers Over Another.

Congress asserts that broadcast interests deserve protection and warrant restrictions on cable. See Cable Act § 2(a)(9)-(19). In fact, broadcasters do not need protection; they dominate television, earning more than 92% of all advertising revenue. Hendricks Decl. ¶ 42. But in any event, "the concept

that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (striking down, inter alia, election campaign provision that would have limited individual contributions to political candidate). The Court rejected the government's argument that the law was justified by "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." Id. at 48. As the Ninth Circuit put it, the "government must remain scrupulously neutral when regulating expressive activity protected by the First Amendment." Service Employees Internat'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1320 (9th Cir.) (citing Buckley v. Valeo), cert. denied, 112 S.Ct. 3056 (1992).

Government regulations that favor certain classes of speakers over others "will be upheld, if at all," only if the government carries a heavy burden of persuasion. Quincy Cable, 768 F.2d at 1451. By force of directly applicable precedent, elevation of broadcast interests at the expense of the cable is unconstitutional. The D.C. Circuit twice held that the FCC's must-carry rules violated the First Amendment by, inter alia, favoring broadcasters over other classes of speakers.5/

5/ Quincy Cable TV, 768 F.2d at 1450-51 (purpose of FCC regulations was "to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming

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c. Congressional Concern About Cable's Asserted "Market Power" Does Not Justify Forced Speech and Government Invasion of Cable's Editorial Judgment.

Congress rationalizes its broad regulation of the cable medium by citing cable's allegedly "undue market power," Cable Act § 2(a)(2), without noting that over-the-air broadcasters dominate television in terms of share of viewership and advertising revenue. See Hendricks Decl. ¶ 42. In Tornillo, 418 U.S. at 258, the Supreme Court held that even though newspapers had substantial market power, government could not compel the Miami Herald to publish replies to newspaper attacks on a political candidate's record. Even this relatively limited and "fair" intrusion into newspapers' editorial judgment offended the First Amendment--despite the economic and technological changes that "place[d] in a few hands the power to inform the American people and shape public opinion," id. at 250, and despite "the disappearance of vast numbers of metropolitan newspapers, [which] have made entry into the marketplace of ideas served by the print media almost impossible." Id. at 251.

Tornillo teaches that notions of "market power," "economic scarcity," and "natural monopoly" do not diminish the media's constitutional rights. The Supreme Court fortified the expansive First Amendment freedoms of newspapers despite the

> elimination of competing newspapers in most of our large cities, and the concentration of control of

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competitive advantage over cable programmers"); Century Communications Corp. v. F.C.C., 835 F.2d 292, 304-05 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

> media that results from the only newspaper's being owned by the same interests which own a television station and a radio station . . . [and] abuses of bias and manipulative reportage [that] are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires.

Tornillo, 418 U.S. at 249-50; see also Pacific Gas & Elec., 475 U.S. at 9 (applying Tornillo standard to protect expression and editorial freedom of public utility monopolist).

The D.C. Circuit has similarly refused to acknowledge "economic" scarcity as a basis for regulating cable.

> [S]carcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-56, 94 S.Ct. 2831 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.

Home Box Office, 567 F.2d at 46; accord Quincy Cable TV, 768 F.2d at 1450; Cox Cable Communications, Inc. v. United States, 774 F. Supp. 633, 636-37 (M.D. Ga. 1991).6/ As the Tornillo Court understood in rejecting the "economic scarcity" justification for newspaper regulation, a broad notion of "scarcity" empowers

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6/ Some cases nevertheless purport to distinguish the type of scarcity at issue by citing entry barriers to cable that do not apply to "print." See, e.g., Berkshire Cablevision of R.I. v. Burke, 571 F. Supp. 976, 986 (D.R.I. 1983). That argument distorts the relevant market definitions at cable's expense. While it is true that anyone can theoretically print anything, it is certainly not true that anyone can reach the audience of a daily newspaper by their private exertions. Similarly, individuals cannot necessarily reach the audience of a cable operator, but anyone with a video camera and the initiative to market his or her product can reach an audience analogous to the reach of "print."

regulators to invade just about any communications medium with reference to something suitably scarce.

d. Congressional Concern to Enhance "Diversity" Cannot Justify Broad Incursions Into the First Amendment Rights of an Inherently Diverse Medium.

Congress cites as justification for its abridgement of cable freedoms a "substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." Cable Act § 2(a)(6); see also § 2(b)(4). In fact, cable television, not the mass-appeal programming of over-the-air broadcasters, has been the source of diversity in television programming. Hendricks Decl. ¶ 42. In any event, the Supreme Court rejected "promoting a diversity of views" as a justification for forced speech or editorial incursions in Pacific Gas & Electric, 475 U.S. at 19-20 (invalidating government requirement that public utility carry citizen newsletter in its billing envelopes, despite asserted state interest in "promoting speech by making a variety of views available"); see also Century Federal, 648 F. Supp. at 1476-77 (government's "paternalistic role" of "promoting first amendment values" through cable regulation held insufficient to justify impact on first amendment rights).

The purpose of the First Amendment is to "'foreclose government from guardianship of the public mind through regulating the press, speech, and religion.' To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." Riley, 487 U.S. at 791 (quoting Thomas v. Collins,

323 U.S. 516, 545 (1945) (Jackson, J., concurring)).[7/] Justice Stewart warned of "the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'" CBS v. DNC, 412 U.S. 94, 145 (1973) (Stewart, J., concurring). The Cable Act, in its best construction, is just such blind pursuit.

The Cable Act burdens a medium which is the very embodiment of diversity. The superiority of cable over all predecessor technologies in bringing diverse programming to consumers has been proven in the marketplace with the growth of cable and the success of such channels as The Discovery Channel. In striking down the FCC's must-carry rules, the D.C. Circuit noted: "[A] regulatory framework that throttles the growth of new media or otherwise limits the number and variety of outlets for expression is likely to run afoul of the First Amendment's central mission of assuring 'the widest possible dissemination of information from diverse and antagonistic sources.'" Quincy Cable TV, 768 F.2d at 1462 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

7/ Government-compelled diversity by definition supplants all other conceptions of diversity. Such government compulsion therefore impermissibly reduces the speech that would have issued absent government intrusion. Even in the broadcasting context, where government's limited right to regulate is well-established, the Supreme Court has suggested that otherwise valid regulations which might reduce, rather than enhance, speech may be unconstitutional. FCC v. League of Women Voters of California, 468 U.S. 364, 378 n.12 (1984) (citing Red Lion Broadcasting v. FCC, 395 U.S. 367, 393 (1969)).

2. The Scarcity Rationale Justifying Limited Regulation of Broadcasting Does Not Apply to Cable.

The Supreme Court has recognized one key exception to the principle that government cannot intrude upon the operations of the media. Because of the scarcity of broadcast frequencies, and the necessity of licensing these frequencies to avoid "cacophony," government may "treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376, 394 (1969) (upholding constitutionality of FCC's "fairness doctrine," which extended right of reply to personal attacks and political editorials); see also FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978) (because government must play a referee role to allow for the orderly development of the medium, government is entitled to allocate licenses in the public interest); National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943) ("Regulation of radio . . . was vital to its development."). Whatever the merits of the "scarcity rationale,"[8/] it has no application to the cable medium.

8/ The scarcity rationale has been characterized as a dubious and technology-sensitive basis for continued regulation of broadcasting. See News America Publishing, Inc. v. FCC, 844 F.2d 800, 805, 811 (D.C. Cir. 1988) (noting "special characteristics" of broadcasting that permit regulation in ways that could not apply to printed "or other non-broadcast speech" and noting significantly that "new technology may render the [scarcity] doctrine obsolete -- indeed, may have already done so"); see generally Powe, American Broadcasting and the First Amendment (1987)

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For economic reasons, most cable systems carry between 36 and 54 channels, but the number of channels is not physically limited by the electromagnetic spectrum. A single cable operator in an area can offer many more channels than the one channel available to a single broadcaster in an area. Purely economic constraints that limit the number of cable channels do not justify "even limited intrusion into [cable's] First Amendment rights." Id.; see also Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 964 (N.D. Cal. 1987) (rejecting application of spectrum scarcity and analogous physical scarcity arguments to cable).

Nor does municipal franchising, predicated on laying coaxial cable over public rights-of-way, provide a sufficient analogy to FCC licensing of broadcasters to justify restriction of First Amendment rights. "Certainly, the mere fact that the burden on public resources creates a need for government regulation does not lead to the conclusion that the First Amendment allows as much government intrusion in the cable area as it does with regard to broadcasting." Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1406 (9th Cir. 1985), aff'd on other grounds, 106 S.Ct. 2034 (1986). Such a leap does serious violence to established First Amendment doctrines. As the D.C. Circuit explained:

> The potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming

> that is conveyed over the system. No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid.

Quincy Cable TV, 768 F.2d at 1449. Public ownership of rights-of-way used by cable operators extends to government only the narrowest powers of regulation. See Home Box Office, 567 F.2d at 45 n.80. Neither municipal franchising of cable, nor any other superficial analogy to broadcasting,[11/] provides any principled justification for regulation of the cable medium.

3. The Cable Act is Not an "Incidental" Restriction on Speech.

Regulations that promote a governmental interest unrelated to the suppression of free expression are treated as "incidental" restrictions on First Amendment freedoms, and accordingly analyzed under a less restrictive test. Home Box Office, 567 F.2d at 48. That test was established by the Supreme Court in a case involving draft-card burning. United States v. O'Brien, 391 U.S. 367 (1968). The Court held that incidental restrictions on speech are permissible if the regulations "further[] an important or substantial governmental interest . . . and if the incidental

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11/ The most superficial similarity is the point of ultimate distribution: a television set. See, e.g., Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540, 1548 (7th Cir. 1989). But limited regulation of broadcasting is justified by frequency scarcity, not by distribution through a machine. As the Supreme Court has observed, that protected speech is "ultimately distributed" through a machine" is a "meaningless distinction" and cannot justify diminution of First Amendment rights. City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 761-62 (1988).

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377.

The Supreme Court has remarked that the O'Brien interest-balancing test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984). Thus, a city may condition parades on obtaining a permit because use of public thoroughfares and resources necessarily involves the city in logistical coordination (e.g., traffic routing, public safety, police support, etc.) and because the city can ensure the smooth interface of the parade with other activities. But a city may not command parade organizers to include certain floats in the parade, may not dictate that certain floats lead the parade, may not dictate the maximum admission price for festivities associated with the parade, and may not compel the creators of certain floats to make their floats available to all other city parades on equal terms. See generally Forsythe County, Ga. v. Nationalist Movement, 112 S.Ct. 2395, 2401 (1992).

The Cable Act purports to do to the cable medium precisely what government could not do to parades. The Cable Act is therefore not a valid time, place, or manner regulation,[12/] and

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12/ Content-based regulations by definition cannot be valid time, place, or manner restrictions. Pacific Gas & Elec., 475 U.S. at 20.

not an "incidental" restriction on speech. The Cable Act directly targets expression and it is content based.[13/] Indeed, its very purpose is to regulate a First Amendment medium.

B. Multiple Provisions of the Cable Act Fatally Conflict With Cable's First Amendment Freedoms.

As established above, cable is a fully protected First Amendment speaker. Therefore, the government cannot force cable speech, cannot invade cable's editorial judgment, cannot restrict the speech or limit the audience of some to enhance the voice of others on the medium, cannot dictate the cost of cable speech, and cannot legislate a governmental view of diversity.

1. The Act's Rate Regulation Provisions Force Speech, Dictate Editorial Format, Favor Broadcasters Over Cable Programmers, Force Plaintiffs to Vie for Artificially Diminished and Distorted Channel Positions, and Reduce Their Audience.

Section 3 of the Cable Act authorizes local franchising authorities to regulate the rates charged for an operator's basic service tier, unless an exceedingly narrow definition of "effective competition" is satisfied. The Act also defines the

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13/ O'Brien interest-balancing has been the default test for courts that find it unnecessary to resolve the issue whether cable enjoys the heightened protection of the Tornillo standard. See, e.g., Quincy Cable, 768 F.2d 1434; Century Communications, 835 F.2d 292; Cable Alabama Corp. v. City of Huntsville, 768 F. Supp. 1484 (N.D. Ala. 1991). In each case, the court determined that the government failed to adduce a substantial interest and failed to promote it by sufficiently narrow means. Tornillo was not needed to reinforce the First Amendment violation of government intrusion. But the broad regulatory regimen of the Cable Act compels heightened scrutiny unless the word "incidental" is completely divorced from its ordinary meaning.

"minimum content" of the basic service tier as: (1) the local commercial, low-power, and non-commercial educational over-the-air broadcast stations subject to mandatory carriage under sections 4 and 5 of the Act; and (2) any other over-the-air signals that the cable operator carries. The Act further subjects rates at any tier to reduction upon a finding that such rates are "unreasonable."

a. Any Regulation of Cable Rates is Unconstitutional.

The Cable Act singles out the cable industry for rate regulation, without any compelling basis for distinguishing that industry as uniquely deserving of such intrusion. See Minneapolis Star, 460 U.S. at 591; Arkansas Writers' Project, 481 U.S. 221; Meyer, 486 U.S. at 422-23; Riley, 487 U.S. 781. No government regulation could impose a government-mandated fee for the daily editions, oblige a newspaper to carry a "minimum content" in its daily edition, and subject charges for all editions and supplements to reduction if found "unreasonable." No rate restriction applies to the price of newspapers, magazines, video rentals, movie theater tickets, and other popular entertainment and information sources. Nothing in the Cable Act or First Amendment jurisprudence justifies imposing such a scheme on the cable medium.

The Supreme Court struck down an analogous North Carolina law regulating "reasonable fees" that fundraisers could charge for charitable solicitations. Riley, 487 U.S. at 787-95. Even though the North Carolina law was based on a legislative finding

of widespread fundraising fraud, the Court held that solicitation of charitable contributions was protected speech, and accordingly condemned the state requirement that a speaker "prove 'reasonableness' case by case based upon what is at best a loose inference that the fee might be too high." Id. at 793.

Ongoing rate regulation would make cable permanently beholden to government for its economic viability. Cable would have to curry and retain the favor of municipal government to secure favorable rate ceilings. Ironically, the deregulation of cable in 1984 was aimed in part precisely at eliminating this fertile field for subtle and gross abuse.[14/] To borrow the Supreme Court's observation in the context of regulating newsracks, "[i]t is not difficult to visualize a [cable operator] . . . feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its [rate request] application." City of Lakewood, 486 U.S. at 757-58.

Lakewood and similar cases concern unbridled discretion in a one-time grant of permits and licenses, which precise standards

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14/ The House Minority Report on the Cable Act noted the artificial repression of cable rates by local franchise authorities prior to deregulation in 1984, which explained the natural rise in rates to a market level after deregulation. More dangerously, the Minority Report concluded that "vesting political officials with the leverage incumbent in a grant of such rate regulatory authority will invariably result in the sort of mischief, and chilling effect on all (but most especially editorial) speech, that led, in part, to the 1984 law to deregulate the cable industry." H.R. Rep. No. 628, 102d Cong., 2d Sess. 185-86 (June 29, 1992).

could theoretically cure. The infirmity of cable rate regulation, by contrast, cannot be sanitized by "careful" standards. Too many variables invest substantial discretion in the arbiter of rates. A "reasonable" rate set lower than it would have been under free market conditions, or lower than it would have been had the cable operator better pleased the government authority, can be defended in multiple impenetrable ways with reams of statistics, economic theory, and public interest calculus. No reviewing court or commission would have the time to ferret out the countless ways to penalize. If the regulatory scheme "'involves appraisal of facts, the exercise of judgment, and the formation of an opinion'" by the regulatory authority, "'the danger of censorship and of abridgement of our precious First Amendment freedoms is too great' to be permitted." Forsythe County, 112 S.Ct. at 2401-02 (quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940), and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).15/

Even the prospect of benign regulations will not cure the unconstitutionality of tying a protected medium's economic

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15/ Nor can any reviewing court or commission compensate an operator for the burdensome costs of complying with the regulatory regime or contending with its unfair consequences. As the Supreme Court observed in Riley, the North Carolina law compelled the charity fundraiser to "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." 487 U.S. at 794.